89-1932

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

SCOTT A. SEALEY, a Minor, by and through his Guardian Ad Litem, Carl Sealey; CARL SEALEY and Delores Sealey, husband and wife,

Petitioners,

v.

TOYOTA MOTORS CORPORATION
a Foreign Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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QUESTIONS PRESENTED FOR REVIEW

1. Does a state statute which prohibits the bringing of an action in state or federal court in a product liability case after the passage of a term of years, whether or not a course of action or claim has arisen, violate the equal protection clause of the 14th Amendment to the United States Constitution?

2. Does a state statute violate the 7th Amendment to the U.S. Constitution when the statute bars the bringing of a claim or cause of action in a state or federal court where that claim or cause of action arises out of a product liability claim and the bar exists by virtue of the mere passage of time, whether or not any injury has occurred and whether or not any personal disabilities preventing a person from bringing the claim exist such as

minority or insanity? Does such a statute violate the 7th Amendment to the United States Constitution by denying an injured plaintiff a right to a trial by jury, and if it does, should the 7th Amendment be applied to state courts?

LIST OF ALL PARTIES

The parties that appeared at the court below were:

Scott A. Sealey, a minor, by his Guardian Ad Litem, Carl Sealey and Delores Sealey, husband and wife

Toyota Motors Company, a Foreign Corporation

The following non-parties filed amicus briefs:

Lee Aronson, of Attorneys for Amicus Curiae, Oregon Association of Defense Counsel

Emerson G. Fisher, of Attorneys for Amicus Curiae, Oregon Trial Lawyers Association

James N. Westwood, of Attorneys for Amicus Curiae, Product Liability Advisory Council, Inc.

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REFERENCE TO OFFICIAL REPORTS AND OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

A. Sealey v. Hicks, 95 Or App 182, 768 P2d 428 (1989), 309 Or 387, 788 P2d 435 (Or 1990)

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This Petition is based upon Supreme Court Rule 10(b) where a state court of last resort, in this case the Supreme Court of the State of Oregon, has decided a federal question in a way that conflicts with the decision of other state courts of last resort. See Sealey v. Hicks, supra, Justice Fadeley's specially concurring opinion 309 Or 387 at ___, 788 P2d 435, at 441 (1990).

DATE OF ISSUING OF OPINION TO BE REVIEWED

Date of issuing of the court below's opinion was March 6, 1990. The judgment was entered on April 23, 1990.

CONSTITUTIONAL PROVISIONS RELIED UPON

Section 1, 14th Amendment to the United States Constitution:

> "All persons born or naturalized in the United States, subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or amenities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

7th Amendment to the United States Constitution:

> "In suits of common law where the value in controversy shall exceed twenty dollars ($20), the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise be re-examined in any court of the United States, that according to the rules of the common law."

CONCISE STATEMENT OF THE CASE

On April 23, 1986, 15 year old Scott

A. Sealey, the plaintiff, was a passenger in a 1975 Toyota Land Cruiser. The driver, defendant Eric James Hicks, also a minor, lost control of the vehicle. The vehicle rolled over and its roof came off. An expert gave an opinion that the vehicle was defective, in that it had a propensity to roll over at low speed and its roof was not designed to stay on in such an accident. The plaintiff was seriously injured, and is now a quadriplegic. The plaintiff, through his guardian ad litem, filed his original complaint on August 27, 1986. Defendants were Eric Hicks, Toyota Motor Distributors and Toyota Motor Corporation. Toyota Motor Corporation moved for Summary Judgment, claiming that the action was time-barred by ORS 30.905(1).

> [(1) Notwithstanding ORS 12.115 or 12.140 and except as provided in subsection (2) of

> this section and ORS 30.907, a product liability civil action shall be commenced not later than eight years after the date on which the product was first purchased for use or consumption.]

Because the vehicle was originally sold in May of 1975 and the accident occurred more than eight years later [1] the trial court agreed and granted summary judgment. Finding no reason for delay, the court entered judgment for Toyota Motors Corporation and against plaintiff. The plaintiff appealed and the Court of Appeals for the State of Oregon upheld the constitutionality of ORS 30.905(1). The plaintiff requested review from the Oregon Supreme Court, which was granted. The Oregon Supreme Court issued its opinion upholding the constitutionality of the

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[1] The full text of the statute is set forth in the Appendix.

statute in question.[2]

The defendant, Toyota Motor Corporation, filed a Motion for Summary Judgment at the state trial court level. The plaintiff, the minor Sealey, raised his constitutional arguments as a defense to the defendant Toyota Motor Corporation's Motion for Summary Judgment. As part of that defense, the plaintiff pointed out that ORS 30.905(1) had been adopted by the legislature of the State of Oregon as the result of a nationwide campaign by the insurance industry to limit their exposure and liability to products liability actions, with the promise to the state legislatures that insurance rates would be reduced and products liability insurance would be more readily available to manufacturers. The

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[2] Oregon Supreme Court's opinion is set forth in full in the Appendix.

promise of the insurance industry to the legislators was obviously not kept, and it was argued that a proper classification by the legislature therefore did not exist since legislative intent had not been achieved and has resulted in special legislation denying equal protection as guaranteed under the 14th Amendment.

The argument was likewise raised by the minor plaintiff in defense to the defendant Toyota Motor Company's Motion for Summary Judgment pointing out that the offending statute supra denied this minor plaintiff access to the courts for redress of injuries done to him, thus denying him a trial by jury and taking away his common law rights contrary to the guarantee given to him in the 7th Amendment to the United States Constitution. The Trial Court granted Toyota Motor Corporation's Motion for Summary Judgment, denying the

plaintiff's constitutional argument. The Court of Appeals of the State of Oregon, where the minor party again raised his constitutional arguments, affirmed the Oregon State Trial Court. The Supreme Court of the State of Oregon granted review, and after review, again denied minor plaintiff's constitutional arguments. Minor plaintiff raised the constitutional issues presented in this petition at the earliest possible stage permitted to him by the pleading and practice of the State of Oregon.

ARGUMENT

The common law allowing injured plaintiffs to recover damages from the manufacturer of defectively manufactured products is generally considered to have been first articulated in the New York case of MacPherson v. Buick Motor Company, 217 NY 382, 111 NE 1050 (1916).

In the 1970's, after substantial losses by the insurance industry brought on by a recession, the industry mounted a nationwide lobbying campaign to limit its liability. A similar campaign was mounted by the insurance industry after the losses it sustained by virtue of the market forces created by the early 1980's recession. Again, the insurance industry went to the state legislatures for relief. ORS 30.905(1) was a part of that scheme by the insurance industry to restore itself to profitability at public expense, and injured plaintiffs in particular, and to erode away the long-established concepts of the common law as enunciated in MacPherson v. Buick, supra. The entire legislative scheme is set forth in Appendix.

For a discussion of the legislative history of this statute and other statutes

adopted by other states across the county, see Erickson Air Crane Company v. United Technologies Corporation, 303 Or 281, 735 P2d 614 (1987), on reconsideration 303 Or 452, 736 P2d 1023 (1987) and Heath v. Sears and Roebuck Company, 462 A2d 288 (NH 1983). The facts in this case clearly indicate that the Toyota Land Cruiser involved was dangerously defective and the manufacturer had issued no warnings.

This Court, in discussing statutes of limitation, has said:

> "It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purpose of its provision." Iseminger, 185 US 55 at 62, 22 S.Ct. 573 at 575, 46 L.Ed. 804

(1902).

ORS 30.905 is unconstitutional under the 14th Amendment of the United States Constitution, as this Court has said in Plyer v. Noe, 457 US 202, 216-218, 102 S.Ct. 2382, 72 L.Ed. 786 (1982):

> "The equal protection clause directs that all persons similarly-circumstanced shall be treated alike."

F.S. Royster Guano Company v. Virginia, 253 US 412, 415 (1920).

> ". . . the initial discretion to determine what is 'different' and what is 'the same' resides in the legislature of the states. . . and applying the equal protection cause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose."

> "But we would not be faithful to our obligations under the 14th Amendment if we applied so differential a standard to every classification. The equal protection clause was intended as a restriction on state legislative action inconsistent

> with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a 'suspect class' or that impinge upon the exercise of a 'fundamental right'. With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the state to demonstrate that its classification has been precisely tailored to serve a compelling government interest. In addition, we have recognized that certain forms of legislative classification while not facially invidious, nevertheless give rise to recurring constitutional difficulties; in these limited circumstances, we have sought assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the state."
> Plyer v. Noe, supra.

It would appear that this Court has developed a three-tiered scrutiny model for analyzing equal protection problems. The middle tier, or intermediate scrutiny

is used to evaluate legislative restriction of an important if not "fundamental right". The technique of intermediate scrutiny permits the Court to evaluate the rationality of the legislative judgment with reference to well-settled constitutional principals. 457 US at 218, footnote 16. In the case at bar, ORS 30.905 deprives this plaintiff of his right to seek indemnification for his severe personal injuries before his cause of action accrues. The Oregon Supreme Court, in Erickson Crane supra recognized that ORS 30.905 was enacted after a major lobbying effort by business and insurance organizations. The Oregon legislature acted on the perceived problems of the high cost of liability insurance. Assuming that the cost of insurance is a valid state concern, there is nothing in the legislative history to

show such a substantial state interest to warrant treating the victims of defective products differently from the victims of other torts. ORS 30.905, as it was enacted, does not further a substantial state interest. This is particularly so since the reasoning upon which the statute was based, the lowering of product liability insurance rates, did not come about. See Heath supra.

There is a substantial division amongst the states as to the constitutionality of statutes of this type. See Sealey v. Hicks, supra at the concurring opinion of Justice Fadeley. See also

405 ALR 4th 461 which sets forth the particulars of the diversity between the states on this issue.

ORS 30.905 Violates
The 7th Amendment To
The U.S. Constitution

ORS 30.905(1) and other like state statutes produced as a result of the insurance industry's lobbying efforts deny injured plaintiffs a right to trial by jury as guaranteed in the 7th Amendment to the United States Constitution. In denying this claim, the Oregon Supreme Court cited Dohaney v. Rogers, 281 US 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930). That case was not based upon this fact situation, and the plaintiff respectfully contends that the legal principals are different. The fact situation here, and in other states similarly situated, is that special interest legislation is enacted that takes away the public's common law right to use the courts of the land, both federal and state, to seek compensation for injuries suffered. Clearly, if this case were brought in a

federal court under diversity jurisdiction, the statute would be used by the defendant as a bar to trial by jury in federal court.

CONCLUSION

It is respectfully urged that this honorable court grant the plaintiff's Petition for a Writ of Certiorari and give this young plaintiff his day in court to seek compensation for the virtually life-destroying injuries sustained by this young man as a result of a defectively manufactured foreign product, the Toyota Land Cruiser in question.

Richard H. Muller
Attorney for Petitioner

APPENDIX

Filed Supreme Court Mar 6 1990 1(a)

IN THE SUPREME COURT OF
THE STATE OF OREGON

SCOTT A. SEALEY, a minor, by and through his Guardian Ad Litem, Carl Sealey; CARL SEALEY and DELORES SEALEY, Husband and wife,

Petitioners on Review,

v.

ERIK JAMES HICKS, a minor; LEONARD C. BLOYD; TOYOTA MOTORS DISTRIBUTORS, INC.
a California corporation,

Defendants,

and

TOYOTA MOTORS CORP., a foreign corporation,

Respondent on Review.

* * * * * * * *

(TC 86-0869C; CA A47084; SC S36025)

On review from the Court of Appeals.*

Argued and submitted June 14, 1989.

Richard H. Muller, Portland, argued the cause and filed the petition for Petitioners on Review.

Jonathan M. Hoffman, Portland, argued the cause for Respondent on

Review.

Jay. M. Smyser, Chicago, Illinois; and Miller, Nash, Wiener, Hager & Carlsen and James N. Westwood, Portland, filed a brief on behalf of amicus curiae Product Liability Advisory Council, Inc.

Emerson G. Fisher, Portland, filed a brief on behalf of amicus curiae Oregon Trial Lawyers Association.

Lee Aronson and Schulte, Anderson, DeFrancq, Downes & Carter, P.C., Portland, filed a brief on behalf of amicus curiae Oregon Association of Defense Counsel.

Before Peterson, Chief Justice, and Linde, ** Carson, Jones, Gillette, Van Hoomissen and Fadeley, Justices.

GILLETTE, J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

Fadeley, J., specially concurred and filed an opinion.

*Appeal from Washington County Circuit Court, Nancy W. Campbell, Judge pro tempore. 95 OR App 182, 768 P2d 428 (1989).

**Linde, J., retired January 31, 1990.

GILLETTE, J.

The primary issue in this products liability case is whether ORS 30.905,[1] the products liability statute of ultimate repose, violates either the Oregon Constitution or the Seventh or Fourteenth Amendments to the United States Constitution. A secondary issue concerns whether plaintiffs' complaint alleges a negligent, continuing failure on the part of the manufacturer to warn

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[1] ORS 30.905 provides:

"(1) Notwithstanding ORS 12.115 or 12.140 and except as provided in subsection (2) of this section and ORS 30.907, a product liability civil action shall be commenced not later than eight years after the date on which the product was first purchased for use or consumption.

"(2) Except as provided in ORS 30.907, a product liability civil action shall be commenced not later than two years after the date on which the death, injury or damage complained of occurs."

of the product's defective and dangerous condition. If the pleadings adequately allege such a theory, a question arises whether the time limit imposed by ORS 30.905(1) can be avoided by pleading a negligent continuing failure to warn consumers of such dangers. We hold that ORS 30.905 is constitutional under both constitutions. We further hold that plaintiff's allegations are insufficient to raise a theory of negligent, continuing failure to warn of a dangerous or defective product.

FACTS

On April 23, 1986, 15-year-old Scott Sealey, the plaintiff, was a passenger in a 1975 Toyota Landcruiser. The driver, defendant Erik James Hicks, also a minor, lost control of the vehicle. The vehicle rolled over and

its roof came off. Plaintiff was seriously injured and is now a quadriplegic.

Plaintiff, acting through his guardian ad litem, filed his original complaint on August 27, 1986. The defendants were Hicks, Toyota Motor Distributors, and Toyota Motor Corporation (TMC). TMC moved for summary judgment, claiming that the action was time barred by ORS 30.905(1) because the vehicle was originally sold in May of 1975 and the accident occurred more than eight years later. The trial court agreed and granted summary judgment. Finding no reason for delay, the court entered judgment for TMC and

against plaintiff pursuant to ORCP 67 B.[2]

Plaintiff appealed, contending that, insofar as ORS 30.905(1) bars a claim before the injury upon which it is based even occurs, the statute is

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[2] ORCP 67 B provides:

"When more then one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all the parties."

unconstitutional. Plaintiff further contended that, even if ORS 30.905(1) is constitutional, he also has alleged ordinary post-purchase negligence, governed by the general torts statutes of limitation and repose, ORS 12.110(1)[3] and 12.115, and his complaint was timely under those statutes.[4]

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[3] ORS 12.110(1) provides in pertinent part:

"An action for assault, battery, false imprisonment, or for any other injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commended within two years * * * ."

[4] ORS 12.115 provides:

"(1) In no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of.

"(2) Nothing in this section shall be construed to extend any period of limitation otherwise established by law, including but not limited to the

The Court of Appeals upheld the constitutionality of ORS 30.905(1).[5] Sealey v. Hicks, 95 Or App 182, 768 P2d 428 (1989). The Court of Appeals further fulled that plaintiff had not alleged a continuing failure to warn and, even if he had, the definition of "product liability civil action" provided in ORS 30.900[6] included within

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limitations established by ORS 12.110."

[5] TMC also claimed that an earlier, favorable resolution of this same claim against co-defendant Toyota Motor Distributors was the law of the case and absolved it as well. The Court of Appeals rejected that contention. The issue was not raised before us and we do not consider it.

[6] ORS 30.900 provides:

"As used in ORS 30.900 to 30.920, 'product liability civil action' means a civil action brought against a manufacturer, distributor, seller or lessor of a product for damages for personal injury, death or property damage arising out of:

its limitation any failure to warn concerning a defective product. We allowed plaintiff's resulting petition for review to address the important issues involved.

THE STATUTE'S MEANING

The products liability statute of repose, ORS 30.905(1), states that it applies "except as provided in subsection (2) of this section." This language could be read to make the time limit in ORS 30.905(1) subordinate to the time limit in ORS 30.905(2). If it were so read, the fact that plaintiff

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"(1) Any design, inspection, testing, manufacturing or other defect in a project;

"(2) Any failure to warn regarding a product; or

"(3) Any failure to properly instruct in the use of a product."

commenced this action less than two years after the accident would make the action timely under ORS 30.905(2). This interpretation, however, renders ORS 30.905(1) a virtual nullity -- an action brought 10, 20 or even 30 years after a product was "first purchased for use or consumption" would still be timely so long as it was brought within two years of the date of the "death, injury or damage complained of." The legislature cannot have intended to enact a provision that would have no legal effect.

A brief look at the legislative history reveals the legislature's intent and a rational statutory structure. ORS 30.905(2) is a statute of limitation. Anyone injured by a defective product has two years

from the date of the death, injury, or damage complained of to commence a civil action. ORS 30.905(1), on the other hand, is a statute of repose. The legislature has determined that an injury occurring more than eight years after a defective product first entered the stream of commerce is not legally cognizable. See Minutes, House Judiciary Committee, May 16, 1977, pp 10-12. Plaintiff here filed within two years of his injury, but his injury did not occur within eight years of the date the vehicle first was purchased. Subsection (1) of ORS 30.905 is the applicable subsection. Plaintiff's case therefore was properly ended by summary judgment, unless some constitutional provision, state or federal, forbids the

enactment or application of ORS 30.905(1). We turn to that issue.

THE STATUTE'S CONSTITUTIONALITY

Plaintiff attacks the constitutionality of ORS 30.905(1) on five separate bases, there under the Oregon Constitution and two under the Federal Constitution. As is our normal practice, we consider the three state constitutional challenges before moving on to the federal issues. See, e.g., State v. Kennedy, 295 OR 260, 666 P2d 1316 (1983).

1. Article I, Section 10

Article I, section 10, of the Oregon Constitution provides:

> "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him and his person, property or reputation."

Plaintiff contends that ORS 30.905(1) violates this section because it bars his claim before the claim ever accrues, thereby denying him a "remedy by due course of law for [an] injury done him and his person." Plaintiff is particularly aggrieved because the statute of repose eliminates his remedy even before he has suffered an injury. This is true. ORS 30.905(1) does bar plaintiff's claim and deny him a remedy for what would otherwise be a legally cognizable injury. However, ORS 30.905(1) is nonetheless constitutional.

This court already has considered and upheld the constitutionality of another statute of ultimate repose under similar circumstances. In Josephs v. Burns & Bear, 260 OR 493, 491 P2d 203 (1971),

the plaintiffs were the owners of a building whose roof collapsed more than 10 years after its construction. Plaintiffs alleged that the collapse resulted from the defendant's negligent construction of the building.

At that time ORS 12.115(1) provided:

> "In no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of."

The trial court sustained the defendant's demurrer on the basis that the statute of limitations had run prior to the commencement of the action.[7]

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[7] Although the Josephs court referred to ORS 12.115(1) as a "statute of limitation," we prefer to view it in this context as a "statute of ultimate repose." A "statute of limitation" limits the time a party has to initiate and action once a claim has accrued. A "statute of ultimate repose," on the other hand, provides a deadline for the

This court affirmed the trial court's ruling despite the plaintiffs' contention "that a statute which purports to extinguish a remedy before the legally protected right becomes actionable is unconstitutionable because it contravenes Article I, section 10, of the Oregon Constitution * * *." Id. at 502. We held:

> "Assuming that the effect of ORS 12.115(1) is to abolish causes of action in tort where the damage does not result within ten years after the negligent acts or omissions complained of, we seen nothing unconstitutional in so doing. * * *
>
> "* * * * *
>
> "It has always been considered a proper function of legislatures to limit the availability of causes of action by the use of statutes of limitation so long as it is done for the purpose of protecting a recognized public interest. It is

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initiation of an action whether or not the injury has been discovered or has even occurred.

> in the interest of the public that there be a definite end to the possibility of future litigation resulting from past actions. It is a permissible constitutional legislative function to balance the possibility of outlawing legitimate claims against the public need that at some definite time there be an end to potential litigation."

The reasoning of Josephs is equally applicable to civil product liability actions.* The legitimate legislative purposes behind ORS 12.115(1) also support ORS 30.905(1).

Article I, section 10, does not apply to a situation like the present one. The legislature has the authority to determine what constitutes a legally cognizable injury. It has

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* In fact, prior to the enactment of ORS 30.905(1) we held in Johnson v. Star Machinery Co., 270 Or 694, 530 P2d 53 (1974), that the general torts statute of repose, ORS 12.115(1), also applied to strict product liability actions.

chosen to declare that injuries resulting from defective products are not legally cognizable if they occur more "than 8 years after the date on which the product was first purchased for use or consumption." In making this determination, the legislature has not deprived this plaintiff of a preexisting remedy for his injury.[9]

Plaintiff relies heavily on Heath v. Sears, Roebuck & Co., 464 A2d 288 (NH 1983). In Heath, the Supreme Court of New Hampshire struck down the entire New Hampshire products liability statutory scheme as unconstitutional

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[9] Prior to the enactment of ORS 30.905, this plaintiff would have been barred by the general ten-year ultimate statute of repose, ORS 12.115(1), which we applied to product liability actions in Johnson v. Star Machinery Company, supra n 9.

under the New Hampshire state constitution. Obviously, Heath has no direct authority here, but we are always open to persuasive analysis from any source. However, we find little helpful assistance in the Heath opinion.

Heath rests on a similar state constitution remedies clause. Part one, article fourteen of the New Hampshire Constitution provides:

> "Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obligated to purchase it; completely and without any denial; promptly, and without delay; conformably to the laws."

The New Hampshire Supreme Court views this clause as a substantive guarantee that the state courts will provide a remedy to every citizen for every injury. Based on this provision, the

court determined that "although not a fundamental right, 'the right to recover for personal injuries is * * * an important substantive right.'" Id. at 294. An attempt to alter or eliminate this right was subject to attack under the state's equal protection clause wherein "classifications * * * were required to be 'reasonable' and to 'rest upon ground of difference having a fair and substantial relation to the object of the legislation.'" Id. at 294-95. the court reviewed various provisions of the product liability law and found that many of the provisions were unreasonable or not "substantially related to a legitimate legislative object." Id. 296. The 12-year statute of repose was found unreasonable because it could deprive persons of a remedy before their

claim had accrued and because it was, in that court's view, unrelated to the underlying purpose of holding down insurance rates, primarily because "the crisis in products liability insurance had abated nationwide independent of [this law]."[10] Id.

Such statements reflect a fundamental difference between the powers and duties of the Supreme Court of New Hampshire and of this court. There is no "substantive due process" clause in our constitution. We are not empowered to strike down a duly enacted law simply because we believe it is unwise, unnecessary, or unsuccessful.

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[10] There apparently was some support in the record for this conclusion in the form of a report by a New Hampshire Legislative Commission to Study Product Injury Reparations.

Apparently, the Supreme Court of New Hampshire is so empowered. Lacking such a power, we are in no position to strike down ORS 30.905(1) under a Heath approach.

2. Article I, Section 17

Article I, section 17, of the Oregon Constitution provides:

> "In all civil cases the right of Trial by Jury shall remain inviolate."

Plaintiff argues that, "[b]y denying this minor plaintiff any access to the Oregon Courts, ORS 30.905 has deprived the minor plaintiff [of] the right to have his claim heard by a jury." This contention is without merit. ORS 30.905(1) terminates product liability claims for all persons no matter what their age. Plaintiff is not deprived of any right or privilege because of his

age. Section 17 is designed to guarantee a jury trial when a right to a trial exists in a civil action."[11] It is not an independent guarantee of the existence of a cognizable claim.

3. Article I, Section 20

Plaintiff contends that ORS 30.905 violates Article I, section 20, of the Oregon Constitution:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

The question is whether plaintiff is a member of a class, some of whom have been denied a privilege or immunity granted to others in the same class, or

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[11] By "civil action" we mean what was once called an action at law. There is no right to a jury trial in equity. Phillips v. Johnson, 266 Or 544, 549, 514 P2d 1337 (1973).

whether the manufacturers and sellers of products have been granted a privilege or immunity not available equally to others in the same class. See State v. Clark, 291 Or 231, 237-40, 630 P2d 810 (1981).

In evaluating whether a class exists under Article I, section 20, we must first determine whether the class "is created by the challenged law itself" or "by virtue of characteristics * * * apart from the law in question." State v. Clark, supra, 291 Or at 240. Classes of the first type are entitled to no special protection and, in fact, are not even considered to be classes for the purposes of Article I, section 20. See, e.g., Hale v. Port of Portland, 308 Or 508, 783 P2d 506 (1989); Cole v. Dept. of Rev., 294 Or

188, 191-92, 655 P2d 171 (1982); State v. Freeland, 295 Or 367, 374-75, 667 P2d 509 (1983); Norwest v. Presbyterian Intercommunity Hosp., 293 Or 543, 567-78, 652 P2d 318 (1982); State v. Clark, supra Or at 242-43.

There are three classes alleged to be at issue in this case:

(1) Persons injured by products more than eight years after their initial sale, contrasted with persons injured by products sold more recently;

(2) Potential tortfeasors who injure their victims with eight-year-old manufactured products, contrasted with tortfeasors who injure their victims in other ways; and

(3) Persons injured by products, contrasted with those persons injured by other causes.

The first two classes are clearly classes "created by the challenged law itself." Any statute of repose, by setting a time limit beyond which the legislature declines to recognize the existence of a legal injury, will divide tortfeasors and their victims into classes based upon those time limits. However, such a desision is within the purview of the legislature.

The third class does exist apart from the statute. Whether an idividual is injured by a manufactured product or in some other fashion is not dependent upon the terms of the statute. Nevertheless, the legislature has the

authority to decide, for example, that increases in insurance rates or other costs associated with litigation warrant legislation to limit the liability of manufacturers in order to ensure the continued availability of manufactured goods at a reasonable cost. If the legislature attempted to deny a recovery to specific individuals, or to permit the courts to deny such a recovery to arbitrarily chosen members of the same class, Article I, section 20 might be violated. But that is not the case here."[12] See Hale v. Port of Portland,

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[12] If, for example, the legislature established a statute of repose that applied only to this defendant, to injured persons with facial hair, or to persons born in Canada, we doubtless would strike down the limitation as a violation of Article I, section 20.

supra; State v. Freeland, supra; State v. Clark, supra.

4. Seventh Amendment

Plaintiff contends that ORS 30.905(1) violates his right to a jury trial under the Seventh Amendment in the United States Constitution. The Seventh Amendment right to a jury trial does not apply to the states. See, e.g., Dohany v. Rogers, 281 US 362, 50 S Ct 299, 74 L Ed 904 (1930).

FOURTEENTH AMENDMENT

Plaintiff claims that ORS 30.905 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. We disagree. In a federal equal protection analysis, the first step is to ascertain the level of scrutiny to be applied to the governmental action.

The appropriate level of review in this case is the "rational basis test." Under this test, a court simply asks whether "a classification bears a rational relationship to an end of government which is not prohibited by the Constitution." If it does bear such a relationship, the matter is at an end. 2 Rotunda, Nowak & Young, Treatise on Constitutional Law: Substance and Procedure 324 (1986). Clearly, the classifications made by ORS 30.905(1) do bear such a relationship to legitimate legislative ends, among them avoiding the necessity of trying stale claims. This argument is not well taken.

CONTINUING FAILURE TO WARN

Plaintiff's final argument is that his complaint alleged a negligent continuing failure to TMC to warn of the

Landcruiser's defects. If plaintiff is correct, that portion of his complaint would be governed by the two-year negligence statute of limitation, ORS 12.110, and summary judgment would not have been appropriate. TMC responded, and the Court of Appeals agreed,[13] that plaintiff alleged no continuing failure to warn. We agree that plaintiff's complaint did not adequately raise the question of a continuing failure to warn.

The closest plaintiff's complaint came to such allegations were the following allegations:

> "[A] proximate cause and/or enhancement of plaintiff's personal injuries was the negligence of defendant [TMC] in one or more of the following particulars:

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[13] Sealey v. Hicks, 95 Or App 182, 185, 768 P2d 428 (1989).

"* * * * *

"4. In failing to give adequate warning of the vehicle's dangerous propensity to roll over at low speeds."

The only reasonable reading of these allegations is that they refer to an initial failure to warn prior to the first sale of the vehicle; they cannot also be read to include a failure to warn at some later date after the product's defect was discovered. While ORAP 12 a directs that "[a]ll pleadings shall be liberally construed with a view of substantial justice between the parties," we would have to rewrite these pleadings, not construe them, to make out a claim of negligent continued failure to warn. The Court of Appeals

correctly concluded that this theory had not been adequately pleaded."[14]

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

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[14] We express no opinion as to whether a properly pleaded continuing failure to warn would actually state a cause of action independent of the statutory product liability claim.

FADELEY, J., specially concurring

I concur in the result in this case. The pleadings do not meet requirements for a "continuing duty to warn" or for some other theory based on a duty, which might have been available, arising within two years of complaint.

However, I am not able to join the rest of the opinion which discusses a constitutional guarantee without analyzing that guarantee or its roots or purposes. We all agree in this country that the constitution and the rights guaranteed therein control over statutes. But that is only true so long as courts will make the constitution effective. Indeed, this country was founded as a result of a revolution wherein the courts had not accorded the

"colonists" their fundamental rights under basic English law. Establishment of three separate co-equal branches of government followed hard on the heels of that experience. Assigning courts the task of enforcing constitutional rights was a creative tour de force by our predecessors. The independent judiciary was created to assure that there is always a governmental institution strong enough to have its way and charged with the responsibility for upholding the constitutional rights of individuals attacked or eroded by actions of other governmental branches.

The portion of this court's opinion which I do not join appears to me to possibly permit a statute of the legislative branch to overrule the constitutional right. That portion of

the opinion appears to do so unnecessarily because no justifiable case for a remedy in due course of law was pleaded.

Article I, section 10 of the Oregon Constitution provides, among other things, that every person "shall have remedy by due course of law for injury done him in his person, property, or reputation." This clause uses mandatory language about two ideas. Each person shall have a remedy. That remedy shall be by due course of law. The remedy and the due course of law apply to injury done to the person.

In this case, a 15-year old boy is a lifetime quadriplegic as a result of an accident which may have been substantially caused by dangerous driving characteristics of a specific

vehicle. These dangerous characteristics, producing prior accidents, may well have been known to the manufacturer for years before the plaintiff suffered his lifetime injury. In an effort to allow manufacturers to build into their price a component of cost for future risks of injury by their products, the legislature chose to limit the period of risk to eight years.[15]

It is true, as the opinion of the court points out, that the statute could be read another way. It could be read to limit to eight years plus two years after causing an injury. However, my concurrence here does not take issue with the reading in the court's opinion that the intention of the legislature

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[15]In any case, the injury in this case occurred more than ten years later.

was to absolutely limit the period of risk to eight years.

After the eight-year period expired, the driving accident, which may have been caused by the known dangerousness of the vehicle when being driven, occurred. That directly raises the issue of whether the legislature may properly make a choice to hold down the costs to the manufacturer to the first eight years of risk and place the remaining costs on those people who may be injured after the eighth year. Does that square with every person "shall have a remedy by due course of law for injury done him in her person?"

In effect, the court's opinion says, "yes, the legislature may be statute make the cost-shifting choice notwithstanding the constitutional

guarantee. The statute may overrule the constitution and its guarantee.

This constitutional concept -- a remedy by due course of law for injury to the person -- is over seven hundred years old. The guarantee is a commonplace in state constitutions.[16] In our constitution, and that of other states, the physical placement of the guarantee connects it to and locates it with ideas found in Magna Carta concerning courts being open, speedy, and complete in their resolution. The remedy by due course of law developed rapidly after Magna Carta and provided a great strength to the common law. In a relatively short time, this development

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[16] Index volume, Constitutions of the United States National and State (Columbia University Oceana. (1982)) lists 36 states with such constitutional provisions.

yields the idea that individuals were protected by the law even against the sovereign. The law was superior to the whims, wishes, or even the considered decisions of that sovereign where there was a conflict between them.

Thus, in the Statues of Westminister; the Second, 1285 A.D., in Article XXIV is found a provision that requires a "writ" to be made for plaintiff's case even though the standard forms available at the court clerk's office did not provide a writ to cover the case. The statute said "a writ shall be made, lest it might happen hereafter that the court should long time fail to minister justice unto complainants." And thus, it is found in Article XI of the Massachusetts Declaration of Rights of 1780:

"Every subject of the

> Commonwealth ought to find a certain remedy by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws." 1 Schwartz, The Bill of Rights, 342 (1971).

The extent of the court's analysis is to cite an Oregon case involving negligent construction more than ten years before the injury, and to engage in a debate with the Supreme Court of New Hampshire which results in a distinction between what the court's opinion sees as the powers of this court and the powers of that court. The depth and breadth of the analysis of the constitutional issue in this court's opinion is (a) to cite one of this court's decisions entered in 1971, which

contains no analysis of the clause; (b) to distinguish a New Hampshire case holding to the contrary of this court's opinion, on the basis that New Hampshire courts have greater power to declare a statute unconstitutional than does this court; and (c) to point out that the statute is labeled a "statute of repose" (by the current opinion of the court) rather than of "limitation." In brief, the court disposes of the constitution by overruling its provisions through invoking the statute and its label. The court makes no mention of distinguishing the coverage of the constitutional guarantee from the coverage of the statute by interpreting the constitutional provision on the basis of its roots or its meaning.

While the New Hampshire case is the only other-state case mentioned in the court's opinion, that decision is only one of many state-court decisions on point. Of the states that had considered a similar question bearing on their state constitutions, seven declared the statutes unconstitutional while six upheld the statutes. Note, Status and Trends in State Products Liability Law: Statutes of Limitation and Repose, 14 J Legis. 233, 238 n.38 (1987).

A reader of the court opinion may gain the implication that where the cause of action involves liability for harm done by a product but where the duty owed to the injured person arose less than two years before the injury caused by the breach of that duty and

where the complaint to recover was also within that two years, a statute of repose will nonetheless prevent any action or remedy in due course of law for the injury."[17] I do not join in any such implication. Nor do I join in discarding the protections of the remedy by due course of law clause without the court first providing an analysis of the nature of those protections.

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[17] Examples may include: failure to recall a dangerous vehicle to correct the danger after having been ordered to do so by an appropriate governmental agency; or failure to take

IN THE SUPREME COURT OF THE
STATE OF OREGON

SCOTT A. SEALEY, a minor, by and through his Guardian Ad Litem, Carl Sealey; CARL SEALEY and DELORES SEALEY, husband and wife,	Washington County Circuit Court No. 89-0869C
Plaintiff-Appellants-Petitioners on Review,	CA A47084
v.	SC S36025
ERIK JAMES HICKS, a minor, LEONARD C. BLOYD; and TOYOTA MOTORS DISTRIBUTORS, INC., a California Corporation,	
Defendants,	
and	
TOYOTA MOTORS CORP., a foreign corporation,	
Defendant-Respondent-Respondent on Review.	ORDER STAYING ISSUANCE OF APPELLATE JUDGMENT

Petitioners on review have moved, pursuant to ORAP 14.10, to stay issuance of the appellate judgment

pending the filing and disposition of a petition for writ of certiorari to the United States Supreme Court. Respondent on review has not opposed the motion.

IT IS ORDERED that the motion is allowed.

DATED this 2 day of May, 1990.

/s/ Ed Peterson
Chief Justice

c: Richard H. Muller
Jonathan M. Hoffman
James N. Westwood
Emerson Fisher
Jay Smyser
Lee Aronson

IN THE SUPREME COURT OF THE
STATE OF OREGON

SCOTT A. SEALEY, a minor, by and through his Guardian Ad Litem, Carl Sealey; CARL SEALEY and DELORES SEALEY, husband and wife,	)	Washington County Circuit Court No. 86-0869C
Petitioners on Review	)	CA A47084
v.	)	SC S36025
ERIK JAMES HICKS, a minor, LEONARD C. BLOYD; TOYOTA MOTORS DISTRIBUTORS, INC., a California Corporation,	)	
Defendants,	)	
and	)	
TOYOTA MOTORS CORP., a foreign corporation,	)	AMENDED ORDER RECALLING APPELLATE JUDGMENT
Respondent on Review	)	

On April 23, 1990, this court's appellate judgment issued and a copy was sent to the Washington County Circuit court.

The court orders the recall of the appellate judgment from Washington County Circuit Court and it shall be noted in the register/record that the appellate judgment of April 23, 1990 is withdrawn.

/S/ Wallace P. Carson, Jr.
CHIEF JUSTICE

27 April 90
DATE

c: Richard H. Muller
Emerson G. Fisher
Jonathan M. Hoffman
Lee Aronson
Jay M. Smyser
Washington County Circuit Court
James N. Westwood

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97310

ORS 30.900 "Product liability civil action" defined. As used in ORS 30.900 to 30.920, "product liability civil action" means a civil action brought against a manufacturer, distributor, seller or lessor of a product of damages for personal injury, death or property damage arising out of:

(1) Any design, inspection, testing, manufacturing or other defect in a product;

(2) Any failure to warn regarding a product; or

(3) Any failure to properly instruct in the use of product. [1977 c.843 Sect. 1]

ORS 30.905 Time limitation for commencement of action.
(1) Notwithstanding ORS 12.115 or 12.140 and except as provided in subsection (2) of this section and ORS 30.907, a product liability civil action shall be commenced not later than eight years after the date on which the product was first purchased for use or consumption.

(2) Except as provided in ORS 30.907, a product liability civil action shall be commenced not later than two years after the date on which the death, injury or damage complained of occurs. [1977 c.843 Sect.3; 1983 c.143 Sect.1; 1987 c.4 Sect.1]

Note: Section 5, chapter 4, Oregon Laws 1987, is repealed on July 1, 1995. See section 7, chapter 4, Oregon Laws 1987, as amended by section 1, chapter 542, Oregon Laws 1989. The text is set forth for the user's convenience.

Sec. 5.: Notwithstanding ORS 30.905, a product liability civil action against the manufacturer of an intrauterine contraceptive device must be commenced not later than two years after the date on which the plaintiff first discovered or, in the exercise of reasonable care, should have discovered the specific disease, injury or permanent disability for which the plaintiff is suing and the tortious act or acts of the manufacturer which caused the disease, injury or permanent disability.

ORS 30.915 Defenses. It shall be a defense to a product liability civil

action that an alteration or modification of a product occurred under the following circumstances:

(1) The alteration or modification was made without the consent of or was made not in accordance with the instructions or specifications of the manufacturer, distributor, seller or lessor;

(2) The alteration or modification was a substantial contributing factor to the personal injury, death or property damage; and

(3) If the alteration or modification was reasonable foreseeable, the manufacturer, distributor, seller or lessor gave adequate warning. [1977 c.843 Sect.4]

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

SCOTT A. SEALEY, a Minor, by and through his Guardian Ad Litem, Carl Sealey; CARL SEALEY and Delores Sealey, husband and wife,

Petitioners,

v.

ERIC JAMES HICKS, a Minor, LEONARD C. BLOYD, and TOYOTA MOTORS DISTRIBUTORS, INC., a California Corporation,

Defendants,

and

TOYOTA MOTORS CORPORATION
a Foreign Corporation,

Respondents.

CERTIFICATE OF FILING

I, Richard H. Muller, being first duly sworn, depose and say that I am the attorney for petitioner herein. That I filed the above PETITION FOR A WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF OREGON with the Clerk of the Supreme Court of the United States on the 4th day of June, 1990, that it was placed in an

envelope properly addressed with prepaid postage thereon and deposited in the United States Post Office at Portland, Oregon.

_____
Richard H. Muller

STATE OF OREGON)
) ss.
County of Multnomah)

Subscribed to and sworn before me this 4th day of June, 1990.

_____
Notary Public for Oregon
My Commission Expires:_____

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION FOR WRIT OF CERTIORARI on the following persons by mailing to each party the number of true and correct copies specified, certified by me as such.

I further certify that said copies were placed in a sealed envelope addressed to:

Jonathan M. Hoffman
Stephanie L. Striffler
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Product Liability Advisory
Council, Inc.

Dated this 4th day of June, 1990.

_____

Richard H. Muller
Attorney for Petitioner